case, the plaintiff had been kept entirely in the dark as to the affairs of the partnership till April 1958, and that the sale and winding-up of the partnership assets without her consent was invalid. *Chapple* v. *Cadell* [1] is authority for the principle that the majority partners have no power to sell the shares of a dissentient partner.

As to the defence of laches and acquiscence, the relative status of the plaintiff and her active partners over the long period of years, the trust she reposed in them, their failure to observe the utmost good faith and fair dealing towards her, their failure to make full disclosure of all material facts, their gross under valuation of the assets of the partnership, the continuation of monthly payments by the company until January 1962 without disclosing to her, for the first four years, that they were capital repayments, and the fact that she is illiterate and ignorant in business matters, are all material facts which in my opinion entitle her to relief.

In conclusion I shall merely quote the summary of the law which applies upon the dissolution of a partnership, set out in page 621 of *Lindley on Partnership* (12th Ed.) as follows:

"(1) That each partner has a right to have the partnership assets applied in liquidation of the partnership debts, and to have the surplus assets divided.

(2) That the right of each partner is to insist on a sale of the partnership assets; there being, in the absence of special circumstances, no right in any partner to have the value of his own or of any co-partner's share determined by valuation, or to have the partnership property, or any portion of it, divided in specie.

(3) That each partner has a right to insist that nothing further shall be done, save with a view to winding up the concern.

I accordingly declare (1) that the partnership was dissolved on April 1, 1958; (2) that the acquisition and taking-over of the partnership as a going concern was void and inoperative; (3) that the lands held under Klang C.T. Nos. 6559 & 6560 and Grant No. 3071 still form part of the assets of the partnership; (4) that the fourth defendant company, from the date of its commencing to trade on January 1, 1954, had the management and control of the business and assets of the partnership as trustee for the plaintiff and first three defendants, and should account to the plaintiff for her share.

I shall hear counsel further before making and giving the order and directions for winding up the affairs of the partnership, and before making the order as to costs.

Order accordingly.

Solicitors: *T. K. Sen & Co.; Skrine & Co.*

BACHAN SINGH v. PUBLIC PROSECUTOR

[A.Cr.J. (Ong J.) October 28, 1964]
[K.L. — Criminal Appeal No. 46 of 1964]

Criminal Procedure — Sentence — Non-compoundable offence — Injured party willing to compound — Consideration of in assessing sentence.

Although the offence charged is not compoundable the fact that the injured party was ready and willing to compound ought to have been taken into consideration when considering the propriety of any sentence.

MAGISTRATE'S CRIMINAL APPEAL.

Lall Singh Muker for the appellant.

Nik Saghir bin Mohd. Noor (Deputy Public Prosecutor) for the respondent.

Ong J.: The appellant was sentenced, on his own plea of guilty, to 18 months imprisonment by the President of the Sessions Court at Klang, for an offence of voluntarily causing hurt to a compatriot, Saudagar Singh, with a parang, contrary to section 324 of the Penal Code. His appeal is against sentence.

Although the offence charged is not compoundable, I think the fact that the injured party was ready and willing to compound ought to have been taken into consideration when considering the propriety of any sentence.

I have been informed by Mr. Lall Singh, counsel for the appellant, that the two men had been neighbours, that their quarrel arose over a trifling matter, that the complainant had since returned to India for good and that the appellant's continued employment as a dredge watchman might be jeopardised by such a long term of imprisonment as 18 months. In particular I have taken into account that a potentially dangerous weapon caused merely a slight injury.

I have therefore allowed the appeal, set aside the sentence of imprisonment and, under section 294 of the Criminal Procedure Code, bound him over in the sum of $500 with one surety for 3 years to keep the peace and be of good behaviour and to appear and receive judgment if and when called upon.

Appeal allowed.

Solicitors: *Lovelace & Hastings.*

MUNICIPAL COUNCILLORS OF MALACCA v. MOHAMED ALI & ANOR.

[O.C.J. (Gill J.) November 14, 1964]
[Malacca — Originating Summons No. 14 of 1964]

Local Government — Municipal Secretary — Appointment of — Liability of Municipal Councillors as trustees — Trustee Ordinance, 1949, ss. 56 and 60 — Municipal Ordinance (Cap. 133), ss. 3, 16, 26, 27 and 29.

This was an application for the determination of certain questions relating to the office of municipal secretary, Malacca. The facts were that the first defendant was originally appointed municipal secretary

and treasurer and a *Gazette* notification setting out the appointment by the Governor-in-Council was published on February 19, 1959. On August 10, 1962, it was decided to terminate his services and on October 25, 1962, a *Gazette* notification terminating his appointment was published. The 2nd defendant was appointed to act as municipal secretary. On September 20, 1963, the municipality asked that the *Gazette* notification terminating the appointment of 1st defendant and appointing the 2nd defendant to act be cancelled and this was done. The first defendant thereupon was recalled to perform the functions of municipal secretary. The application was for the determination of the following questions:—

(1) whether payment of the salary and allowances of the 1st defendant in accordance with the agreements made between the plaintiffs and the 1st defendant dated December 5, 1958 and March 30, 1962 is authorized under the Ordinance for the purpose of section 29(p) of the Municipal Ordinance;

(2) whether the 1st defendant or the 2nd defendant or neither of them is lawfully empowered to exercise the statutory functions of the municipal secretary in relation to the municipal fund and more particularly under sections 16(1) and 27(2) of the Municipal Ordinance;

(3) if there is no lawfully appointed municipal secretary whether the councillors are or may be personally liable for any breach of trust arising from the absence of a lawfully appointed municipal secretary and if so whether this honourable court may relieve such of the councillors as support this application from personal liability for the same under the provision of section 60 of the Trustee Ordinance, 1949 and give directions for the lawful management of the municipal fund and confer any necessary powers on the councillors under section 56.

Held: (1) the payments of salary and allowances of the first defendant from January 1, 1959 to September 20, 1962 and consequential to the termination of his appointment on this latter date were lawfully made, but any payments made thereafter were unauthorised and therefore made unlawfully;

(2) the second defendant is the only person who is lawfully empowered to exercise the statutory functions of municipal secretary in relation to the municipal fund and more particularly under sections 16(1) and 27(2) of the Municipal Ordinance;

(3) there are no grounds for relieving the applicants from personal responsibility, if any, under section 60 of the Trustee Ordinance.

APPLICATION.

H. H. Ball for the plaintiffs.

F. Keith Sellar for the first defendant.

R. R. Chelliah for the second defendant.

Cur. Adv. Vult.

Gill J.: This is an application by the municipal councillors of the Town and Fort of Malacca as trustees of the municipal fund established under section 26 of the Municipal Ordinance (S.S. Cap. 133) for the determination of the following questions:—

(1) whether payment of the salary and allowances of the 1st defendant in accordance with the agreements made between the plaintiffs and the 1st defendant dated the 5th day of December 1958 and the 30th day of March 1962 is authorized under the Ordinance for the purpose of section 29(p).

(2) Whether the 1st defendant or the 2nd defendant or neither of them is lawfully empowered to exercise the statutory functions of the municipal secretary in relation to the municipal fund and more particularly under sections 16(1) and 27(2) of the Municipal Ordinance (Cap. 133).

(3) If there is no lawfully appointed municipal secretary whether the councillors are or may be personally liable for any breach of trust arising from the absence of a lawfully appointed municipal secretary and if so whether this honourable court may relieve such of the councillors as support this application from personal liability for the same under the provision of section 60 of the Trustee Ordinance 1949 and give directions for the lawful management of the municipal fund and confer any necessary powers on the councillors under section 56.

The facts in support of the application as set out in the affidavit of the president of the municipality, Enche Hasnul bin Abdul Hadi, dated the 28th March, 1964 are as follows.

On or about 20th October, 1958 No. 4 committee of the council after interviewing various candidates decided to recommend that Enche Mohamed Ali bin Salleh, the first defendant to these proceedings, be appointed municipal secretary and treasurer, and this decision was confirmed at the council meeting held on 19th November, 1958. An agreement for service was signed between the municipal councillors and Enche Ali on 5th December, 1958, in accordance with the terms of which agreement Enche Ali took up his appointment as municipal secretary on 1st January, 1959.

The power to appoint the municipal secretary then vested in the Governor-in-Council under section 3 of the Municipal Ordinance (S.S. Cap. 133). The recommendation of the council for the appointment of Enche Ali was presumably referred for approval by the Governor-in-Council, and the following notification was published in the Malacca *Gazette* as *Gazette* Notification No. 36 dated the 19th February, 1959:—

"In exercise of the powers conferred by section 3 of the Municipal Ordinance (S.S. Cap. 133) as amended by the Municipal (Amendment) Ordinance 1956 the Governor-in-Council hereby appoints Enche M. Ali bin Salleh as Secretary of the Municipality of the Town and Fort of Malacca, with effect from the 1st of January, 1959, vice Mr. Ong Kim Leong who ceases to act in this appointment."

On 30th August, 1961, in accordance with the terms of his agreement of service with the council, Enche Ali gave notice to the councillors of his desire to continue in the employment of the council after the period of his engagement.

At the meeting of committee No. 4 held on 13th September, 1961 it was unanimously agreed to continue the contract of Enche Ali and this decision was confirmed at the council meeting held on 20th September, 1961.

I pause here to mention that the contract of service of the 5th December, 1958 was for a period of three years, but clause 7 of the agreement provided that the council shall be at liberty to terminate this agreement at any time whatever upon paying to the officer a sum equivalent to 3 months' salary, and clause 8 of the agreement provided that the officer may terminate the agreement by giving to the council 3 calendar months' notice. The agreement also provided as to what salary was to be paid to the officer during the first, second and third years of his service.

On 30th March, 1962 a supplementary agreement was entered into between the municipal councillors and Enche Ali, under which Enche Ali was to be employed for a further period of 3 years from 1st January, 1962, subject to the terms and conditions of the principal agreement dated 5th December, 1958.

On 10th August, 1962, a special meeting of the council decided to recommend to the Governor-in-Council the termination under clause 7 of the principal agreement of the services of Enche Ali by giving him 3 months' salary in lieu of notice and the appointment of Enche Low Eam Kang, the second defendant to these proceedings, as acting municipal secretary and treasurer until a substantive appointment to the post was made. This recommendation was conveyed to the state secretary of Malacca by a letter from the president dated 11th day of August, 1962.

On 4th September, 1962 the state secretary replied to the president that the question of terminating the agreement of service between the municipality and Enche Ali was a matter within the purview of the municipal council.

On 19th September, 1962 the councillors resolved unanimously to terminate the services of Enche Ali as municipal secretary and treasurer under clause 7 of the agreement of service by paying him 3 months' salary in lieu of notice with immediate effect, and on 20th September, 1962 the president wrote to Enche Ali informing him of the decision of the council and handing him a cheque for $5,142.63 being 3 months' salary plus 20 days' salary for September 1962 less provident fund contributions.

On 20th September, 1962 the president wrote to the state secretary informing him of the decision of the municipal councillors to terminate the employment of Enche Ali and requesting that His Excellency the Governor do revoke the appointment of Enche Ali and appoint Enche Low Eam Kang to act as municipal secretary vice Enche Ali with effect from 21st September, 1962. By this time the power of appointment of municipal secretary vested in the Governor by virtue of Legal Notification No. 298/59 as published in the Federal *Gazette*.

Enche Ali wrote a letter dated 20th September, 1962 to the president pointing out that the decision of the council to terminate his services was probably unlawful but stating that it would be unseemly on his part to continue his services to the municipal councillors if a majority of them really wished him to go. He stated further that he had decided to accept the decision without prejudice to his accrued right under the agreement.

On 26th September, 1962 some of the councillors gave notice to the president that the termination of the services of Enche Mohamed Ali bin Salleh was illegal.

On 25th October, 1962 the following notifications were published in the Malacca *Gazette* as Notifications Nos. 177/62 and 178/62:—

"In exercise of the powers conferred by section 3 of the Municipal Ordinance (S.S. Cap. 133) as amended by the Municipal (Amendment) Ordinance, 1956, and L.N. 298 of the 25th August, 1959, the Governor hereby terminates the appointment of Enche M. Ali bin Salleh as Secretary to the Municipality of the Town and Fort of Malacca, with effect from 20th September, 1962.

Gazette Notification No. 36 published in the Malacca Section of the Federation of Malaya Government *Gazette*, Vol. III No. 4 dated 19th February, 1959, is hereby cancelled."

"In exercise of the powers conferred by section 3 of the Municipal Ordinance (S.S. Cap. 133) as amended by the Municipal (Amendment) Ordinance, 1956, and L.N. 298 of the 25th August, 1959, the Governor hereby appoints Enche Low Eam Kang to act as Secretary to the Municipality of the Town and Fort of Malacca, with effect from 21st September, 1962, vice Enche M. Ali bin Salleh whose appointment has been terminated."

On 29th October, 1962 the state secretary wrote to Enche Ali stating that the termination of his contract of service was purely for the Malacca municipality to decide and since such decision had already been taken by the municipality the Governor-in-Council would not be in a position to disagree with them and as such had been compelled to terminate his appointment, vide *Gazette* Notification No. 177 published on 25th October, 1962.

On 16th August, 1963, by which time there had been a change of councillors, Enche Ali wrote to the newly-elected president informing him of the illegality of the termination of his services and giving the new council an opportunity to right the wrong alleged by him to have been done to him.

On 20th September, 1963 the newly-elected municipal council passed a resolution to rescind

the decision of the special meeting of the municipal councillors on 10th August, 1962 for the termination of Enche Ali's contract of service and respectfully to request His Excellency the Governor of Malacca to cancel *Gazette* Notification No. 177/62 by which the services of Enche Ali had been terminated. The council also passed a motion that the appointment of Enche Low Eam Kang as acting secretary with effect from 1st September, 1962 be terminated with immediate effect and that His Excellency the Governor of Malacca be requested to cause to be published a notification in the *Gazette* terminating the services of Enche Low Eam Kang and a further notification cancelling *Gazette* Notification No. 178/62 by which his acting appointment was made.

On 7th October, 1963 the state secretary wrote to the president of the municipal council drawing attention and making an objection to the fact that Enche Ali was carrying on the duties of municipal secretary. The president replied to the state secretary on 8th October, 1963, informing him of the motion which had been passed on 20th September, 1963 and requesting that the necessary actions be taken. The state secretary wrote to the president on 15th October, 1963 refusing the request.

It would appear that Enche Ali started to exercise the powers and to perform the duties and functions of the municipal secretary from 21st September, 1963, and that as from that date Enche Low Eam Kang ceased to act as secretary. It has been argued on behalf of the applicants that *Gazette* Notification No. 177/62 cancelled *Gazette* Notification No. 36/59 so that there has been no municipal secretary since 1st January, 1959. I do not agree. It is not clear why *Gazette* Notification No. 36/59 was cancelled, except perhaps that this was done by way of abundant precaution to put an effective end to Enche Ali's appointment as municipal secretary with effect from 20th September, 1962. To my mind this cancellation of *Gazette* Notification No. 36/59 does not in any way invalidate the services of Enche Ali as municipal secretary from 1st January, 1959 to 20th September, 1962.

Having dealt with the facts I now come to the questions to be determined in these proceedings. As Enche Chelliah on behalf of the second defendant has pointed out, the answers to the questions depend on the answer to the question as to where the powers of appointment and dismissal of the municipal secretary lay. It is common ground that the power to appoint vested in the Governor-in-Council until 24th August, 1959 and thereafter in the Governor alone. It is usual for recommendations to be made by the appropriate authority for such an appointment to be made, but the appointing authority, in the absence of any specific provisions of law, is not bound to accept such recommendations, although it is by no means uncommon for such recommendations to be accepted.

By virtue of section 29 of Interpretation and General Clauses Ordinance, 1948 (Malayan Union) the power to appoint includes the power to dismiss and also the power to appoint another person temporarily in the place of the person dismissed. By section 28 of sub-section (2) of the same Ordinance the person appointed to act may exercise the powers and perform the duties of the office to which he is appointed in an acting capacity.

Thus it would seem clear that the power to appoint a municipal secretary, to dismiss him and to appoint some one to act temporarily as municipal secretary vested in the Governor-in-Council and after 25th August, 1962, in the Governor alone. By virtue of the provision of section 31 sub-section (2) of the Interpretation and General Clauses Ordinance, 1948, the Governor also had power to make an appointment with retrospective effect to any date not being a date earlier than the commencement of the written law under which the appointment was made.

In the present case Enche Ali was duly appointed as municipal secretary by the Governor with effect from 1st January, 1959 vide *Gazette* Notification No. 36/59 dated 19th February, 1959. His services were duly terminated by the Governor with effect from 20th September, 1962 vide *Gazette* Notification No. 177 dated 25th October, 1962. He thus ceased to hold office with effect from that date, and in point of fact he did not perform the duties of municipal secretary with effect from that date until 21st September, 1963.

If Enche Ali has been exercising the powers and performing the duties of municipal secretary with effect from 21st September, 1963 he has been doing so without any authority and therefore illegally. The motion by the newly-elected council on 20th September, 1963 in no way revived his appointment which had been duly terminated. It was open to the council at that stage to make a recommendation to the Governor that Enche Ali be re-appointed, but instead of making such a request they proceeded to ask that *Gazette* Notification No. 177/62 be cancelled so as to revive his earlier appointment made by *Gazette* Notification No. 36/59. What they were in fact asking was that he be cloaked with the authority of municipal secretary even for the period of 9 months during which he did not exercise the powers and perform the duties of municipal secretary and was paid no salary.

They were in fact asking the Governor to invalidate his dismissal. It is therefore not surprising that this request was turned down. As I have stated above, I fail to see why they did not choose to adopt the only course which was open to them at that stage, namely, to make a recommendation that Enche Ali be re-appointed with effect from the date on which they had authorized him, in my opinion, illegally, to exercise the powers and perform the duties of municipal secretary. I am equally at a loss to understand why instead of starting these proceedings an approach was not made to His Excellency the Governor to appoint Enche Ali retrospectively from 21st September, 1963.

I now come to the position of Enche Low Eam Kang, the second defendant to these proceedings. As I have pointed out, he was appointed to act as municipal secretary with effect from 21st September, 1962 by *Gazette* Notification No. 178/62. That acting appointment has never been terminated by His Excellency the Governor. The state secretary in his letters to the president of the municipality dated 7th and 15th October, 1963, was at pains to point out that the appointment of Enche Low Eam Kang was still valid and that he was then the only duly appointed person to act as municipal secretary. Yet in apparent defiance of what he stated in his letters the municipal councillors chose to allow Enche Ali to continue as municipal secretary and to deprive Enche Low Eam Kang of his right to act in the appointment of municipal secretary.

The third question raised by the applicants refers to sections 56 and 60 of the Trustee Ordinance, 1949. To my mind section 56 of the Ordinance has no application whatsoever to these proceedings. It is only under section 60 of the Ordinance that the applicants can ask for any relief. Section 60 of the Ordinance relates to the power of the court to relieve trustees from personal liabilities for any breach of trust in relation to a trust fund. What they are in fact asking is that if Enche Ali's salary has been paid unlawfully out of the municipal fund or if any other breach of trust has arisen in the course of the exercise by Enche Ali of his powers of municipal secretary they ought fairly to be excused for the breach of trust. Not wishing to criticise in harsh terms the conduct of the municipal councillors, I would content myself by saying that I can find no grounds whatsoever for exercising my discretion under section 60 of the Ordinance to excuse them for any breach of trust because I find myself unable to say that they acted honestly and reasonably.

The answers to the questions which I have been asked to determine will be as follows:—

(1) That the payments of salary and allowances of the first defendant from 1st January 1959 to 20th September 1962 and consequential to the termination of his appointment on this latter date were lawfully made, but that any payments made thereafter were unauthorised and therefore made unlawfully.

(2) That the second defendant is the only person who is lawfully empowered to exercise the statutory functions of municipal secretary in relation to the municipal fund and more particularly under sections 16(1) and 27(2) of the Municipal Ordinance (S.S. Cap. 133).

(3) That there are no grounds for relieving the applicants from personal responsibility, if any, under section 60 of the Trustee Ordinance, 1949. And I make a declaration accordingly. I also make an order that the costs of the second defendant, who appears to be the only aggrieved party in the proceedings, be paid by the applicants out of the municipal fund. I make no other order as to costs.

Declaration accordingly.

Solicitors: *Allen, Gledhill & Ball; Sault, Keith Sellar & Co.; R. R. Chelliah & K. T. Joseph.*

PASUMA PHARMACAL CORPN. v. McALISTER & CO. LTD.

[F.C. (Thomson L.P., Wee Chong Jin C.J. (Singapore) and Tan Ah Tah F.J.) November 16, 1964]

[Singapore — Federal Court Civil Appeal No. 15 of 1964]

Contract — Agreement for 5 years — Termination by vendor without provision for termination — Fraud of servant of purchaser — Whether termination lawful before the expiration of the contract.

Damages — Breach of agreement by one party — Duty upon other party to take all reasonable steps to mitigate loss occasioned by the breach.

The appellants appeal against the judgment of the trial judge (reported in [1964] M.L.J. 190) in so far as it relates to the counterclaim as gives the respondents damages for breach of contract and the respondents appealed against the dismissal of the counterclaim in respect of the stock of 1¾ oz. bottles remaining in their hands.

Held: (1) the respondents were not entitled even to nominal damages on that part of the counterclaim;

(2) there was no reason to interfere with the trial judge's dismissal of the counterclaim in respect of the stock of 1¾ oz. bottles remaining in the respondents' hands.

Observations on implied terms of contract.

Cases referred to:—

(1) *Bonham-Carter* v. *Hyde Park Hotel* 64 T.L.R. 177, 178.

(2) *Scammell* v. *Ouston* [1941] A.C. 251, 267.

(3) *British and Benningtons Ltd.* v. *N. W. Cachar Tea Co.* [1923] A.C. 48, 71.

(4) *Panama and South Pacific Telegraph Co.* v. *India Rubber Gutta Percha and Telegraph Works Co.* L.R. 10 Ch. App. 515, 526.

(5) *The Moorcook* 14 P.D. 64, 68.